**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **PAUL C. FAUCHER** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **ADP TOTALSOURCE** | ) | |
| Respondent | ) | Docket No. 1,028,546 |
| | ) | |
| AND | ) | |
| | ) | |
| **AMERICAN HOME ASSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent requested review of the July 23, 2008, Award by Administrative Law Judge John D. Clark (ALJ). Claimant was awarded benefits for a 31 percent functional impairment to his right lower extremity after the ALJ found that claimant's slip and fall on December 8, 2005, constituted an accident which arose out of and in the course of claimant's employment with respondent. The Appeals Board (Board) heard oral argument on November 5, 2008.

### APPEARANCES

Gerard C. Scott, of Wichita, Kansas, appeared for claimant. Clifford K. Stubbs, of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument to the Board, the parties agreed that, if this accident is found to be compensable, the 31 percent impairment of function awarded by the ALJ is proper and may be adopted by the Board for the purpose of this Award. The parties further agreed

that the fringe benefits are to be added to claimant's average weekly wage on March 1, 2006, rather than on January 1, 2006, as stated in the stipulation filed with the Division of Workers Compensation on June 10, 2008.

## ISSUES

The ALJ found that claimant was injured out of and in the course of his employment with respondent on December 8, 2005, and, therefore, was entitled to a 31 percent impairment of function of the right leg based on the opinions of Terrence Pratt, M.D.

Respondent requests review of whether claimant's alleged injuries arose out of and in the course of his employment with respondent. Respondent argues that claimant's December 8, 2005, fall was the result of the everyday activity of walking, and not in any way related to claimant's employment. Respondent further argues that the fall was a natural, direct and probable consequence of his preexisting back injury and cane usage.

Claimant contends that the ALJ's Award should be affirmed.

## FINDINGS OF FACT

Having reviewed the evidentiary record filed herein and the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked as a salesman for respondent out of Shawnee Mission, Kansas. His job required that he call on customers away from respondent's business, which required that he travel. On December 8, 2005, claimant was calling on a customer in the Towne East Mall in Wichita, Kansas, after spending the night in a local motel. Claimant had suffered a back injury earlier that year, which necessitated that he use a cane to walk. On December 8, claimant was dropped at the door of the mall by an associate in order to make a sales call on a customer. The weather was bad as it had snowed that morning. Claimant entered the mall from the east or main door. As he proceeded into the mall, approximately 20 to 25 feet from the door, claimant's cane slid on a wet spot and he fell, landing on his right knee. Claimant ultimately sought treatment the following Monday, after returning to Kansas City.

Claimant first sought treatment on that Monday in the emergency room at the Kansas University Medical Center (KU). Claimant underwent a knee wash on December 23, 2005. He had been able to perform his regular job up to that date. Claimant had developed an infection as the result of the fall. This infection, identified as MRSA septic arthritis of the knee, resulted when claimant fell and the trauma from the knee

injury caused inflammation in the knee and bacteria was introduced into the knee. Claimant underwent an extensive regimen of antibiotics under the treatment of Lisa Clough, M.D., an infectious disease specialist at KU, and the infection was controlled. Dr. Clough stated that the infection was likely the same one that claimant had developed after his back surgery in August 2005. It was this back surgery which necessitated that claimant use the cane on the date of accident.

Claimant was referred to Terrence Pratt, M.D., of Rockhill Orthopaedics, P.C., for an examination on February 9, 2007. Dr. Pratt agreed that the fall led to the knee infection. He opined that claimant's benign familial pemphigus, which results in skin lesions, was the cause of the infection. He testified that the infection from the back surgery had resolved. Dr. Pratt instructed claimant to use a cane to help him ambulate. Claimant was assigned a 31 percent impairment to the right lower extremity as the result of this injury. Dr. Pratt's rating was pursuant to the fourth edition of the AMA *Guides*.[1]

## PRINCIPALS OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[2] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2005 Supp. 44-501(a).

> occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]
>
> An injury shall not be deemed to have been directly caused by the employment where the injury results from normal activities of day-to-day living.[6]

Claimant slipped and fell as he was walking through the mall on his way to visit a potential customer of respondent. There is no doubt that this accident occurred while claimant was in the course of his employment. Respondent contends that the accident did not arise out of the employment as claimant's slip and fall was a normal activity of day-to-day living, i.e., the act of walking. However, it was not the act of walking that caused this accident. It was the slip and fall which caused the injury to claimant's right knee. Slipping on a wet surface and falling would not constitute a normal activity of day-to-day living. As such, claimant's disability did not result from simply walking, but, instead, from the injury sustained from the fall.

Respondent further argues the use of the cane was the cause of this slip and fall and the cane was necessitated by the prior back surgery. This fact is verified by Dr. Pratt who testified that claimant would not have fallen but for the fact he was using the cane. While the Board acknowledges the argument raised by respondent has merit, the Board finds claimant's accident arose out of claimant's employment for the following reasons:

In *Hensley*,[7] the Kansas Supreme Court categorized risks associated with work injuries into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. This analysis is similar to the analysis set forth in 1 *Larson's Worker's Compensation Law*, § 7.04[1][a] (2006). The simplest explanation is that if an employee falls while walking down the sidewalk or across a level factory floor for no discernable reason, the injury would not have happened if the employee had not been engaged upon an employment errand at the time.

> Where an employment injury is clearly attributable to a personal (idiopathic) condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. [Citation omitted.] But where an injury

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[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 2, 147 P. 3d 1091, *rev. denied* 281 Kan. ___ (2006).

[7] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

> results from the concurrence of some preexisting idiopathic condition *and* some hazard of employment, compensation is generally allowed.[8]

The Kansas Court of Appeals ratified the rules set forth both in *Hensley* and *Bennett* in the case of *Anderson.*[9] In *Anderson*, the claimant had a long history of back problems. In the course of his job, the claimant got in and out of automobiles 20 to 30 times per day, while installing convertible tops, headliners and carpets. The court, after an extensive review of Kansas case law dealing with preexisting conditions, determined that the "concurrence of his preexisting personal degenerative conditions and a work-related hazard" was a compensable injury under Kansas workers compensation law.[10]

Here, claimant suffered from a preexisting back injury which required he use a cane. That fact does not take away from the fact claimant was injured while calling on a client, a clear benefit to his employer. The existence of the bad back and the use of the cane do not act to make this incident a non-work-related accident. Pursuant to *Hensley*, *Bennett* and *Anderson*, the Board finds that claimant's slip and fall on December 8, 2005, resulted from an accident which arose both in the course of claimant's employment and out of his employment with respondent.

## CONCLUSION

Claimant has satisfied his burden of proving that the fall on December 8, 2005, in the Towne East Mall in Wichita, Kansas, constituted an accident which arose out of and in the course of his employment with respondent. The Award of the ALJ should be affirmed.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated July 23, 2008, is affirmed.

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[8] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 460, 824 P.2d 1001, *rev denied* 250 Kan. 804 (1992).

[9] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

[10] *Id*. at 12.

**IT IS SO ORDERED.**

Dated this _____ day of November, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gerard C. Scott, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge